Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	))	CC Docket No. 01-321

COMMENTS OF THE VERIZON TELEPHONE COMPANIES

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COMMENTS

The Verizon Telephone Companies ("Verizon")[1] respectfully submit their comments on the above-captioned notice of proposed rulemaking.[2] Given the competitive nature of the special access marketplace, there is no justification for imposing compulsory special access reporting requirements and enforcement mechanisms. Such intrusive and unwarranted regulation would harm competition and, in some respects, would transcend the Commission's authority.

I. <u>INTRODUCTION AND SUMMARY</u>

The special access market is a competitive success story, with numerous facilities-based competitors vying to serve sophisticated customers who possess considerable bargaining power. This competition has developed over the past twenty years,[3] to the point where interexchange carriers ("IXCs"), competitive access providers ("CAPs"), competitive local exchange carriers

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[1] The Verizon Telephone Companies are identified in Attachment A hereto.

[2] *See Performance Measurements and Standards for Interstate Special Access Services* Notice of Purposed Rulemnaking, FCC 01-339 (rel. November 19, 2001) ("*NPRM*").

[3] Special access competition began even before divestiture and developed rapidly following the Commission's *Expanded Interconnection* and *Transport Rate Restructure* decisions. *See Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs,* 7 FCC Rcd 7369 (1992) ("*Special Access Expanded Interconnection Order*"), *vacated and remanded in part*, Bell Atlantic et al. v. FCC et al., 24 F.3d 1441 (D.C.Cir. 1994); *Transport Rate Structure and Pricing Petition for Waiver of the Transport Rules Filed by GTE Service Corporation*, Report and Order and Further Notice of Purposed Rulemaking, 7 FCC Rcd 7006 (1992).

("CLECs"), incumbent local exchange carriers ("ILECs"), and end users themselves (many of whom can and do build their own dedicated facilities) all compete with one another. As a result of this competition, the Commission has been able progressively to relax regulation of ILEC special access services in light of the efficacy of market-based checks on pricing and performance.[4]

Notwithstanding this track record of progressive deregulation and effective, burgeoning competition, the Commission now seeks comment on whether it should establish special access performance measures, reporting requirements, and enforcement mechanisms. The Commission suggests that such action would "provide greater transparency of the incumbent LECs' special access provisioning" and provide a disincentive to discrimination.[5] At the same time, however, the Commission recognizes that doing so could impose significant implementation and reporting costs and burdens.[6]

There is no legitimate justification for – and there would be no appreciable benefit from – adopting these burdensome new requirements. Competition disciplines the provision of special access services by all suppliers, whether ILECs, CLECs, or IXCs. Verizon strives to provide the

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[4] *Special Access Expanded Interconnection Order*, 7454, 7463 (allowing volume and term discounts and density zone pricing based upon certain competitive showings); *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Purposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21487 (1996) (eliminating the lower service band indices); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominate Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Purposed Rulemaking, 14 FCC Rcd 14221 (1999) ("Pricing Flexibility Order") (granting the ability to file contract tariffs and remove special access services from price cap regulation upon specific competitive showings), *aff'd*, WorldCom, Inc. et al. v. FCC et al., 238 F.3d 449 (D.C. Cir. 2001).

[5] *NPRM*, ¶ 13.

[6] *Id*.

highest quality service to all of its special access customers, both carriers and end users. Indeed, Verizon already voluntarily provides special access performance reports to roughly 51 carriers in response to market demands.

Moreover, existing carrier-to-carrier problem resolution procedures, backed up if necessary by the Commission's complaint process, are sufficient to address whatever isolated problems arise. In contrast, imposing new regulatory obligations that uniquely burden one class of competitors inevitably would distort competition and harm consumers. The proposals constitute regulatory "creep" of the worst kind and should not be adopted.[7]

If the Commission nonetheless decides to adopt performance reports, they must apply equally to all competitors, whether CLECs, CAPs, or ILECs. In this competitive marketplace, imposing disparate reporting obligations upon ILECs would be inequitable and of dubious legality. In addition, such asymmetric reporting requirements would distort competition by leading customers to draw potentially inaccurate inferences about the relative service quality of different providers.

Furthermore, any performance measures must take into account the significant differences between special access services provided to carrier and end user customers. Special access services are governed by Section 202(a), which bars "unreasonable discrimination" for like services. The special access services provided to Verizon's carrier and end user customers are not "like" because of differences in the complexity of the product mix and variations in the ordering process that are tailored to meet the unique requirements of each customer group.

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[7] Remarks of Chairman Michael K. Powell, "Digital Broadband Migration, Part II," at 2 (Oct. 23, 2001).

Finally, the Commission lacks the authority to impose a self-effectuating enforcement mechanism involving automatic payment of liquidated damages to competitors. Section 503 prohibits the Commission from issuing a forfeiture penalty unless and until there has been notice and a hearing to determine whether a violation of the Act has occurred. Automatic forfeitures would not only exceed the Commission's statutory authority, but also would violate the constitutional due process rights that Section 503 seeks to protect and render the Section 208 complaint process meaningless. In any event, even if the Commission could adopt a self-executing enforcement mechanism as a general matter, the complaint process is the only legal means by which *competitors* can be compensated. Section 504 mandates that any forfeiture penalties be payable to the United States Treasury, not to competitors.

II. <u>THE COMMISSION SHOULD NOT ADOPT SPECIAL ACCESS PERFORMANCE MEASURES AND STANDARDS.</u>

A. <u>The Competitive Special Access Marketplace Renders the Proposed Performance Measures Unnecessary and Counter-Productive.</u>

The NPRM recognizes that, "[i]n evaluating the benefits and burdens of … additional regulation, we must also consider whether such regulation is necessary in light of the current marketplace conditions."[8] Beyond any reasonable dispute, the answer is that robust competition in the provision of special access services undermines any basis for such regulation.

The special access marketplace is rife with competition. Together, competitive special access providers earned more than $7.3 billion in special access revenues in 2000, or approximately 57 percent as much as was earned by the RBOCs. The CLECs' and IXCs' share

[8] *NPRM*, ¶ 14.

of special access revenues is roughly 36 percent.[9] All told, almost 350 entities report to the Commission that they provide competitive access service, and these companies have deployed at least 200,000 route miles of local fiber.

Perhaps most prominent among these are the Big 3 IXCs, who are not only the largest purchasers of special access service from ILECs, but also major self-suppliers. Both AT&T and WorldCom have local facilities that are used to provide special access services in nearly 200 markets, and Sprint is deploying local fiber rings in 20 major U.S. markets.[10] In total, there are more than 600 fiber networks in the top 150 MSAs, with 77 of the top 100 MSAs served by at least three competitive networks, 47 served by at least five, and 27 served by at least seven. The top 10 MSAs are served by an average of 14 competitive fiber networks, and the top 50 MSAs by an average of six.[11] Competitive facilities exist wherever there is demand for them, whether in downtown areas of large cities or in rural office parks.

In addition, and perhaps most tellingly, collocation by facilities-based competitors is so prevalent that 80 percent of BOC special access revenue qualifies for Phase I pricing flexibility and nearly two-thirds qualifies for Phase II relief.[12] Verizon already has received Phase II relief

[9] *Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport*, at 5 ("Special Access Fact Report"), filed as Attachment B to the *Joint Petition of Verizon, SBC, and BellSouth for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport* , CC Docket No. 96-98 (filed April 5, 2001).

[10] *Special Access Fact Report* at 5-7, Appendix B.

[11] *Id.*

[12] *Special Access Fact Report* at 5-7. The strict tests needed to secure Phase I and Phase II relief demonstrate that pricing flexibility truly is predicated on substantial competition by facilities-based providers. To get Phase I relief for special access transport services, a LEC must show either (a) that at least one facilities-based collocator is present in at least 15 percent of the LEC's wire centers in the relevant MSA, or (b) that at least one facilities-based competitor is collocated in wire centers accounting for 30 percent of the petitioner's special access revenues (other than from channel terminations) in the MSA. To obtain Phase II relief for transport services, a facilities-based collocator must be present either in 50 percent of the wire centers or in wire centers accounting for 65 percent of the

for MSAs covering 40 percent of its special access revenues and Phase I relief for MSAs covering an additional 11 percent of its special access revenues. And, Verizon has filed a pending petition which, if granted, would result in price deregulation for MSAs in which Verizon earns over 50 percent of its special access revenues and Phase I relief for MSAs that account for over 20 percent of Verizon's special access revenues.[13] As impressive as these numbers are, they understate the degree of competition because the pricing flexibility analysis, which focuses on collocation, does not consider competition from entities that bypass the ILEC, connecting end users directly to fiber rings that, in turn, connect to IXCs and ISPs.

Verizon recognizes that competitors have disputed the validity of some of these data at the margins.[14] Although these attacks are, at best, glancing blows, the Commission need not accept the foregoing statistics in order to conclude that the special access market is vigorously competitive. Indeed, AT&T itself has conceded that competitors have a 22 percent share of the market,[15] and that number improperly excludes a large amount of special access revenues served (or self-supplied) by non-ILECs.[16] Moreover, the nature of demand for special access services – large, sophisticated customers who are geographically concentrated – enables competitors to

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LEC's non-channel termination special access revenues. For channel terminations, the triggers are even higher: for Phase I relief, a facilities-based collocator must be present either in 50 percent of wire centers or wire centers accounting for 65 percent of channel termination revenues, and for Phase II relief, such a collocator must be present either in 65 percent of wire centers or wire centers accounting for wire centers accounting for 85 percent of the petitioner's channel termination revenues. *See* 47 C.F.R. §§ 69.709, 69.711 (2000).

[13] *See* Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, CCB/CPD File No. 01-27 (filed November 29, 2001).

[14] Reply of Verizon, SBC, and BellSouth, CC Docket No. 96-98, at 23-28 (filed June 25, 2001) (rebutting attacks by AT&T and others on the veracity of the Special Access Fact Report) and Attachment A (Rebuttal Report Regarding Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport) ("*Rebuttal Fact Report*").

[15] *Rebuttal Fact Report* at 2.

[16] *Id.* at 4-9.

address a large portion of the potential customer base (and an even greater portion of potential revenues) with targeted investments.[17]

B. Special Access Competition Drives All Competitors to Provide High-Quality Service, Making Performance Measures Unnecessary.

In the *Pricing Flexibility Order*, the Commission substantially relaxed regulation of ILEC special access rates in areas meeting the test for Phase I relief and deregulated these rates in Phase II areas. It did so to ensure "that 'our own regulations do not unduly interfere with the development and operation of these markets as competition develops.'"[18] Moreover, the Commission found that, under the market conditions justifying Phase II relief, "the availability of alternative providers will ensure that rates are just and reasonable."[19] As the D.C. Circuit explained in affirming the Commission's pricing flexibility framework, the collocation-based triggers "can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior."[20]

For two reasons, these findings compel a determination that there is no need for special access performance measures.[21] First, the same competitive pressures that assure that ILECs will reasonably price special access services assure that ILECs will reasonably provision special access services. Second, the competitive pressures guarantee reasonable provisioning

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[17] *Pricing Flexibility Order*, ¶¶ 97, 106, 142 (discussing "concentration" of demand and "sophisticated customers" for special access); *Special Access Fact Report* at 3.

[18] *Pricing Flexibility Order* at 14357, *quoting Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16094 (1997).

[19] *Pricing Flexibility Order* at 14258.

[20] WorldCom v. FCC, 238 F.3d at 459.

[21] *NPRM*, ¶ 14 (inquiring as to the relevance of pricing flexibility determinations).

throughout Verizon's service area, regardless of whether a particular MSA has qualified for pricing relief.

With respect to the first point, as mentioned above, customers of special access services are highly sophisticated – they include both other carriers (IXCs, CMRS providers, and CLECs) and large businesses. These customers demand high quality service, closely monitor service quality, and exact improvements where the service offered is unsatisfactory. Special access customers make their quality expectations known either formally in requests for proposal or informally in meetings with their account teams. As explained in the next section, Verizon goes to great lengths to satisfy these expectations. Thus, the marketplace already creates powerful incentives for all special access providers, including ILECs, to provide the best possible service. Additional intervention by the Commission is unwarranted (and, as discussed in section III.A, below, would harm competition and disserve consumers' interests).

With respect to the second point, the competitive pressure to provide high-quality service prevails even in MSAs that do not yet qualify for pricing flexibility. Customers procure special access services under terms and conditions that apply to the customers' entire networks. In addition, Verizon's provisioning of special access services is centralized, so that service orders are handled in the same manner regardless of whether they pertain to an MSA that has received pricing flexibility. As a result, the incentive to provide high-quality service that arises from intense competition in so many MSAs throughout Verizon's territory benefits special access customers wherever they are located. This is particularly true given the sheer number of MSAs where Verizon already has received or soon expects to receive pricing relief – if its pending petition is granted, three-quarters of Verizon's special access revenues will derive from MSAs where Verizon has secured either Phase I or Phase II relief.

There is, in short, no need for the Commission to impose mandatory special access performance reporting requirements. Competition, both existing and readily threatened, is working, and the Commission should not intrude upon this effectively functioning marketplace.

C. Verizon Works Closely with its Special Access Customers To Assure that Their Expectations Are Met to the Maximum Extent Possible.

Verizon strives to meet or exceed the expectations of all of its carrier customers. Indeed, Verizon already voluntarily provides special access service quality reports (including various combinations of daily, weekly, and monthly reports) to some 51 different carriers. These voluntary reports are more efficient and meaningful than mandated regulatory reports would be, since they address the criteria identified by customers as most important. The competitive market, in short, already provides the "transparency" that the Commission seeks to achieve by regulatory fiat.

Beyond voluntarily providing detailed reports, Verizon has taken additional measures to ensure that its carrier customers are satisfied. Verizon regularly participates in weekly conference calls and monthly and quarterly face-to-face meetings with its customers to discuss its special access provisioning. In addition, Verizon has implemented several company-wide steps to improve its special access provisioning processes. For example, Verizon internally monitors its performance in relation to the expectations of its carrier customers and, when appropriate, implements changes in response to their expressed concerns. If the market were not competitive, as some CLECs and IXCs undoubtedly will suggest, there would be no need for Verizon to take such pains to ensure that its carrier customers are satisfied. In reality, competition is driving Verizon to be as responsive as possible to all of its special access customers. No additional regulations are necessary.

D. Verizon Has Voluntarily Taken Measures That Are Intended To Help Meet Future Demand.

Verizon has invested in the latest technologies and deployed additional facilities in an effort to meet anticipated demand for special access services and improve its ordering and provisioning processes. Notably, such measures are not legally required; rather, they are compelled by the competitive marketplace. While there will be inevitable situations where facilities are not readily available – affecting carrier and end user customers alike – Verizon is committed as a matter of sound business practice to serving all of its customers as promptly as possible.[22]

For example, Verizon has aggressively deployed the latest technologies to improve its special access services, including high speed Synchronous Optical Network ("SONET") systems[23] and Dense Wave Multiplexing ("DWM") electronics.[24] Verizon also has expedited its expansion of capacity on interoffice SONET routes. Initially, Verizon began planning to supplement capacity when existing capacity was projected to be 90 percent utilized. When special access demand was peaking, however, Verizon began planning to augment its interoffice capacity when existing facilities were at 65 to 75 percent utilization.[25]

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[22] For a period beginning in 2000 and ending in early 2001, Verizon's ability to provision special access orders in a timely manner was adversely affected by two events beyond Verizon's control: (1) the explosion in demand for special access services that began in the latter half of 1999 and accelerated into 2000 (but which has since subsided), and (2) the work stoppage Verizon experienced in August 2000. Verizon worked diligently and successfully to eliminate this backlog. Because this backlog was temporary and affected all of Verizon's customers (whether end users or carriers), Verizon's performance during this period was anomalous and should not be relied upon as a reason to institute special access performance reporting.

[23] SONET is an interoffice signal transport design approach that uses optic fiber cables and various levels of high speed digital signaling. SONET system optic fibers are configured in rings that pass through multiple central office buildings. Between May 1999 and May 2001, Verizon East increased the number of SONET rings by 42 percent. Actual SONET capacity increased by a considerably greater amount, because Verizon has been installing higher capacity rings (mostly OC-48) and electronics.

[24] DWM significantly increases the signal carrying capacity of installed optic fiber facilities.

[25] Currently, Verizon begins planning for relief when utilization is at 70-80 percent.

E. Verizon's Processes Assure Nondiscriminatory Provisioning of Special Access Services As Between Carrier and End User Customers.

Finally, in addition to the substantial effort and tremendous investment noted above, Verizon's processes are designed to assure that all special access orders are provisioned in a nondiscriminatory manner, regardless of the identity of the customer. As a result, there is no opportunity for unreasonable discrimination, further demonstrating that performance reports are not warranted.[26]

The work involved in provisioning a special access service (building the facilities, designing the circuit, completing central office wiring and testing the circuits) is the same for carriers and end user customers. Specifically, once facilities are constructed or determined to be available, Verizon's Circuit Provisioning Centers begin to design the service. The central offices involved in the design of the circuit must be wired to connect the facilities. Thereafter, remote testing is performed to ensure all connections are completed and working. Once testing is complete, the order is dispatched to install the equipment and connections at the end user's premises. Although different internal groups may perform some of these provisioning functions, the process is the same regardless of whether the customer is an end user or a carrier – in fact, the Circuit Provisioning Centers do not know the identity of the customer for whom the circuit is being provisioned.

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[26] Although the NYPSC has said that "the record suggests Verizon treats other carriers less favorably than its own end-users," *see NPRM*, n. 3, that statement was not based on the record of a full, evidentiary hearing. Proceeding on Motion of the Commission To Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case 92-C-0665, Opinion and Order Modifying Special Services Guidelines for Verizon, New York, Conforming Tariff, and Requiring Performance Reporting, Opinion 01-1, at 9-10 (June 15, 2001). Rather, the NYPSC proceeding was a collaborative at which no evidence was presented to support such a conclusion. The NYPSC simply examined three months' worth of selected data without considering the compelling reasons that those data do not indicate discrimination. For a discussion of those reasons, *see* section III.B and fn. 32, *infra*.

Competition in the special access market assures that all providers, including ILECs, will devote the requisite attention and resources to provide the best possible quality of service. Existing voluntary reports and carrier-to-carrier problem resolution procedures, backed up if necessary by the Commission's complaint process, are effective in addressing any problems that may occur. Against this backdrop, adopting the proposed reporting requirements would be antithetical to the Act's deregulatory imperative and impose undue burdens with no offsetting benefits.

III. IF THE COMMISSION NONETHELESS ADOPTS PERFORMANCE REPORTS, THEY MUST APPLY TO ALL COMPETITORS, REFLECT KEY DIFFERENCES BETWEEN SERVICES PROVIDED TO CARRIERS AND END USERS, AND SUNSET WITHIN TWO YEARS.

A. Asymmetrical Reporting Requirements Would Be Inequitable and Would Distort Competition.

As explained above, there is no justification for mandating special access performance reports given the competitiveness of the market. If the Commission nonetheless adopts such a requirement, it must apply to all facilities-based providers of special access services.[27]

Imposing an asymmetric reporting requirement on ILECs would unreasonably burden one group of providers in a vigorously competitive market, increasing their costs and diminishing their ability to compete.[28] ILECs, alone among their multitude of competitors,

[27] *NPRM*, ¶ 15 (asking whether any requirements should apply only to ILECs or to CLECs as well). Notably, the NYPSC recently extended its Special Services Guidelines to all special services providers with at least 50,000 circuits, including CAPs and CLECs. Previously, those Guidelines applied only to Verizon. Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc. Case 00-C-2051, Proceeding on Motion of the Commission to Investigate Performance Dash Base Initiative Regulatory Plans for New York Telephone Company Case 92-C-0665, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines (Dec. 20, 2001) at 12-14.

[28] Undoubtedly, some competitors will oppose universally applicable reporting requirements by asserting that they simply resell the ILECs' special access services and rarely use their own facilities. *AT&T Corp. Petition for Rulemaking to Establish Performance Standards, Reporting Requirements, And Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding the Provision of Interstate Special Access Services*, Petition for Rulemaking, 11 (October 30, 2001). The Commission should not countenance such a claim.

would bear additional costs of tracking performance in line with the Commission's reporting categories that their competitors would have no obligation to satisfy. Consequently, asymmetrical reporting requirements would divert scarce investment resources that otherwise could be used to expand capacity, rendering ILECs less competitive and reducing consumer welfare.

In addition, asymmetrical reporting requirements would distort competition by leading consumers to draw potentially inaccurate inferences – goaded on, of course, by competitors who would stand to gain from such erroneous conclusions. For example, if an ILEC's performance reports indicated a shortcoming, its reputation would suffer even if its competitors (who did not have to disclose their performance) actually provided inferior service. While this inequity could be addressed by adopting universally applicable reporting requirements, the better solution would be to continue the *status quo*, under which buyers and sellers of special access service voluntarily exchange service quality information on terms that are most useful to the buyer while being least burdensome to the seller.

Aside from these compelling policy considerations, asymmetrical reporting requirements would be of dubious legality. Given the competitive nature of the special access marketplace, all carriers are essentially similarly situated. Under these circumstances – and unlike situations where unique burdens on ILECs have been considered necessary to address concerns about control of assertedly bottleneck facilities – imposing disparate special access reporting burdens

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As shown above, competitive special access facilities abound. At a minimum, before the Commission decided to impose unique reporting requirements on the ILECs on this basis, it would have to compel competitors to produce accurate and location-specific information demonstrating the purportedly limited extent to which they provide (either to themselves or to others) special access service using their own facilities. (Of course, if the competitors were correct in this regard then they should not oppose reporting requirements applicable only to facilities-based competitors in the first place.)

on ILECs would be both arbitrary and a potential denial of equal protection. Particularly where there is no good reason to impose performance reporting requirements on the ILECs, prudence dictates that the Commission not run these legal risks.

Finally, the nondiscrimination obligation in Section 272(e)(1) does not justify the imposition of BOC-specific special access reporting requirements.[29] As noted above, any reporting requirements, regardless of the statutory source invoked as authority for their adoption, are unnecessary in light of the degree of competition in the market, voluntary reporting, and the backstop of the Commission's complaint process. Reporting requirements are particularly unnecessary under Section 272(e)(1) because the BOCs' compliance with this section is subject to biennial audits.[30] The audit requirement creates an additional incentive for the BOCs to provide special access in a nondiscriminatory manner and assures that any failure to do so will be revealed to regulators, who can take whatever action is appropriate to remedy the situation.

B. Any Reporting Requirements Must Recognize Differences Among Services Provided to Different Classes of Customers.

If the Commission decides to impose nondiscrimination reporting requirements,[31] notwithstanding the compelling reasons for not doing so, it should keep in mind two key points: First, the non-discrimination obligation applicable to special access provisioning is the "no unreasonable discrimination" standard in Section 202(a). Second, any performance measures

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[29] *NPRM*, ¶ 10. Section 272(e)(1) requires a BOC to "fulfill any requests from an unaffiliated entity for … exchange access within a period no longer than the period in which it provides such … exchange access to itself or to its affiliates." 47 U.S.C. § 272(e)(1).

[30] *Id*. § 272(d).

[31] To Verizon's knowledge, no special access customer has ever filed a complaint alleging discriminatory maintenance and repair, and there is no other evidence that this has been a concern. Nor did the NPRM propose reporting requirements for maintenance and repair. Accordingly, even if the Commission decides to adopt special access provisioning performance reports, there is no basis for including reports regarding maintenance and repair.

must account for the fact that the special access services provided to carriers and to end users are not "like."[32]

The applicable standard.[33] Special access services are ordered pursuant to access tariffs and thus are governed by Section 202(a)'s prohibition on "unreasonable discrimination."[34] The discrimination language in Section 251(c), in contrast, applies only to services and unbundled network elements ("UNEs") ordered pursuant to Section 252 interconnection agreements. That much is made clear not just by the plain language of Section 251(c),[35] but by Section 251(g), which states that the provision of exchange access shall continue to be in accordance with existing equal access and nondiscrimination obligations contained in court orders, consent decrees, or the Commission's rules, orders, or policies.[36] Indeed, the Commission itself, in evaluating Section 271 compliance, has held that special access provisioning is not relevant to

[32] For this reason, among others, neither the current NYPSC Special Services Guidelines nor WorldCom's proposed reports provide an appropriate basis for federal special access performance reports. *NPRM,* ¶ 16. WorldCom's proposed reports are grossly over-inclusive, designed to produce results that disfavor the ILEC, and ignore such key factors as the need to assess facilities availability. The NYPSC's Special Services Guidelines fail accurately to capture Verizon's special access performance because they utilize inconsistent definitions to measure Verizon's provisioning for its carrier and end user customers. In particular, Verizon's end user customer performance reports are based on both designed *and* non-designed services, while its reports on performance for carrier customers include only designed services. Because non-designed services do not require a dispatch, they may be provisioned faster than designed services. As a result, the NYPSC's measurements compare apples to oranges, creating the illusion that Verizon provisions special access service for end users more rapidly than for carriers.

[33] *NPRM*, ¶ 9 (seeking comment on how the different statutory language contained in Sections 251 and 202 impacts special access services and any proposed performance measures).

[34] Section 202(a) states that: "It shall be unlawful for any common carrier to make unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications services, directly or indirectly, by any means of device, or to make or give any undue or unreasonable preference to any particular person, …, or any undue unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

[35] 47 U.S.C. § 251(c)(3) (requiring ILECs to provide access "to network elements" on a nondiscriminatory basis); UNEs are available only under an interconnection agreement or SGAT. 47 U.S.C. § 251(c)(2)(D) (requiring the provision of interconnection on nondiscriminatory rates, terms, and conditions "in accordance with the terms and conditions of the [interconnection] agreement.").

[36] 47 U.S.C. § 251(g).

checklist item 1, which in turn requires the provision of interconnection in accordance with the requirements of Section 251(c)(2).[37]

The "like services" analysis. Section 202(a) considers whether there are differences in the provision of "like" services to "similarly situated" customers, and, if so, whether those differences are reasonable.[38] The D.C. Circuit has explained that the likeness analysis depends upon "functional equivalence"[39] and "focuses on whether the services in question are different in any material functional aspect."[40] Because there are significant, performance-affecting differences in the product mix and the flexibility in the initial ordering process between Verizon's end user customers and carrier customers, the special access services provided to these categories of customers are not "like."

First, the product mix provided to Verizon's end user customers consists predominantly of DS-0 circuits, of which the vast majority are analog. In contrast, Verizon's carrier customers overwhelmingly order High Capacity circuits, which are in very large part digital. The mix of services provided to Verizon's carrier customers is more complicated and, therefore, more time

[37] "The Commission previously determined in the *Bell Atlantic New York Order* that checklist compliance is not intended to encompass provision of tariffed interstate services simply because these services use some of the same physical facilities as a checklist item." *In the Matter of the Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, ¶ 211 (April 16, 2001) (internal citations omitted).

[38] The Commission employs a three-prong test to determine whether a carrier has engaged in unreasonable discrimination: (1) whether the services are "like" one another; (2) if the services are sufficiently similar, whether there is any disparate pricing or treatment between different customers receiving the "like" services; and (3) if disparate pricing or treatment exists, whether such disparity is justified and, therefore, not unreasonable. *People's Network Inc., v. AT&T*, 12 FCC Rcd 21081, 21093 (1997).

[39] *The Competitive Telecommunications Association v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993) ("*CompTel*")

[40] *Id*.

consuming to provision than the less complicated services Verizon's end user customers typically order.

Second, services are not necessarily "like" for purposes of Section 202(a) just because they may utilize similar facilities. In *AT&T Communications Revisions to Tariff FCC No. 12,*[41] for example, the Commission evaluated whether services ordered pursuant to AT&T Tariff 12 were the same as the individually tariffed services provided by AT&T on a disaggregated basis.[42] The Commission concluded that the services were not "like" because AT&T maintained flexibility under Tariff 12 to use any combination of technologies or network components to provide service, and because AT&T performed such extensive service and facility provisioning only for its Tariff 12 customers. In addition, the Commission noted that "the fact that the provisioning changes take place unbeknownst to the customer does not in any way reduce or negate the materiality of this factor."[43] Thus, even though the customers were purchasing functionally similar services and the customers were unaware of the provisioning differences, the Commission found that the two services were not "like" for purposes of Section 202(a).

A similar finding is warranted here: Verizon has tailored its special access ordering and provisioning to accommodate the distinct preferences of its end user and carrier customers. Those differences, as described below, confirm that the special access services provided to these different customer groups are not "like." One service is not better than the other; rather, each is intended optimally to meet the needs of the particular customer group.

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[41] *See AT&T Communications Revisions to Tariff FCC No. 12*, 6 FCC Rcd 7039, 7043-44 (1991) *aff'd. Competitive Telecommunications Association v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993).

[42] *CompTel*, 998 F.2d at 7039-40.

[43] *Id*. at 7044.

Verizon's carrier customers demand the receipt of provisioning information in a timely manner so that they can communicate that information to their end users. As a result, Verizon follows distinct ordering processes for its carrier customers, which include intermediate milestones, such as Firm Order Confirmations ("FOCs"). In particular, when a carrier customer places an order, which is done electronically, Verizon generally provides a FOC within 5-7 business days that contains an estimated due date. Although Verizon conducts a facilities check during that 5-7 day period, where facilities do not exist, the due date merely represents Verizon's best estimate of when facilities will be available and service can be provided.[44] In those cases, Verizon's carrier customers expect it to score the failure to make the estimated availability date as a missed appointment, even if Verizon is able to negotiate another due date and provision the service by that later date.

In contrast, Verizon's end user customers prefer to wait until facilities availability has been verified before they are notified of a delivery date. As a result, Verizon has provisioning flexibility during the upfront negotiation and ordering stage of the special access services for its end-user customers that it does not have for its carrier customers. For example, Verizon is able to deal directly with each end user customer, and the initial negotiations may impact the customer's decision as to when and what type of circuit to order. Unlike carrier customers, Verizon does not provide a FOC or projected due date for its end user customers. Indeed, Verizon typically does not provide its end user customers a due date until it is able to confirm

[44] For example, when facilities must be repaired or constructed, Verizon cannot provide a certain due date within 5-7 days because Verizon does not know exactly when the repairs or the construction of the necessary facilities will be completed. A number of steps must occur before a work order is issued to complete the construction. Verizon must negotiate with its vendors to deliver and/or install equipment such as multiplexers and apparatus cases and, in some cases, must lay cable or fiber to create facilities so that the circuit can be provisioned. If Verizon's vendors are behind in their installation of equipment, this can adversely affect Verizon's ability to complete the order by a date certain. In these circumstances, Verizon can only provide its best estimate of when it will be able to complete the order. Importantly, these procedures are the same regardless of whether the customer is a carrier or an end user. The only difference is that Verizon does not provide its end user customers a FOC with an estimated due date.

that facilities in fact exist and the service can be provisioned. Because Verizon is able to set the due date based on more accurate information, it is better able to meet the due date for its end user customers. In addition, Verizon can renegotiate a due date with an end user customer, while provisioning to carrier customers is measured against the original due date that was communicated on the FOC. As a result, it may appear that Verizon's end user customers receive service by their due date more often that its carrier customers do, but this is simply a product of the fact that Verizon is able to set the date for its end user customers consistent with facilities availability.

It is imperative that the Commission consider these significant differences between end user and carrier special access services if it decides to craft performance measures. In addition, because the services are not "like," the Commission must not base a finding of unreasonable discrimination on a mere difference in particular aspects of reported performance.

C. Any Reporting Requirements Should Sunset No Later Than Two Years After Adoption.

The NPRM states that, "at such time as the services discussed herein are routinely provisioned in a nondiscriminatory and just and reasonable manner," any performance measures adopted in this proceeding will be suspended.[45] By this standard, as made clear above, there is no basis for adopting such requirements in the first place. If the Commission nonetheless does so, it must provide for their prompt and certain termination. In particular, any special access performance requirements should sunset no later than two years after adoption.[46]

[45] *NPRM*, ¶ 19.

[46] *Id.,* ¶ 20.

Adopting a firm, short-term deadline is necessary to avoid creating yet another regulatory program that will take on a life of its own. Reporting requirements, like other forms of well-intended but often unnecessary regulation, tend to become institutionalized. The Commission need look no further than the existing ARMIS 43-05 and 43-06 reports, which were adopted more than a decade ago to monitor the effects of price cap regulation on service quality; at that time, the Commission promised to re-examine service quality reporting requirements as the technology and industry change.[47] Not until late 2000, however, did the Commission propose to prune back those reporting requirements,[48] and more than a year later it still has not acted on those proposals.

As the Chairman has cautioned, the FCC must avoid further regulatory "creep." The best way to do so is to "just say no" to the proposals herein. Failing that, the Commission must commit to prevent these new reporting requirements from taking root and further tangling the regulatory underbrush, by promising to eliminate them no more than two years after their adoption.

IV. THE COMMISSION MAY NOT ESTABLISH A SELF-EFFECTUATING LIQUIDATED DAMAGES MECHANISM.

The Commission should not – and, indeed, may not – establish a "self-effectuating liquidated damages rule" pursuant to section 503(b).[49] As an initial and dispositive matter, there is no need for such action because the competitive marketplace already protects consumers and carriers from unreasonable or discriminatory special access service. Poor service will result in

[47] *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2974, 2995 (1991).

[48] *See 2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements* Notice of Purposed Rulemaking, FCC 00-399 (November 9, 2000).

[49] *NPRM*, ¶ 12.

real marketplace penalties, both as a result of credits contained in carriers' tariffs[50] and, more importantly, the ability of special access customers to take their business to an alternative provider. In addition, the Commission's complaint process provides a further, effective backstop against unlawful behavior.[51] Finally, as discussed below, the Commission lacks authority to impose automatic liquidated damages, and establishing base forfeitures would be both imprudent and of questionable legality.

A. The Commission Lacks Authority to Impose a Self-Effectuating Enforcement Mechanism Involving Payments to Competitors.

Under Section 503(b)(1) of the Act, any person who willfully or repeatedly fails to comply with any provisions of the Act, or any rule or order issued by the Commission, "shall be liable *to the United States* for a forfeiture penalty."[52] Likewise, Section 504 unequivocally states that any forfeitures under Section 503 "shall be payable into the Treasury of the United States."[53] Consequently, even if the Commission had authority to assess liquidated damages under Section 503, which it does not, those damages could not be made payable to competitors.

The only means by which competitors can obtain damages from other carriers is to use the Act's complaint remedy.[54] To do so, the plaintiff must bear the burden of establishing the

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[50] *See* Verizon's FCC Tariff No. 16, Section 2.4 (Payment Arrangements and Credit Allowances) (effective June 14, 2001).

[51] Indeed, in the context of special access services, the *Pricing Flexibility Order* noted on three separate occasions that the section 208 complaint procedures acts as a check against carriers engaging in unreasonable discrimination. *Pricing Flexibility Order*, 14241-42 ("IXCs may file complaints under section 208 of the Act, should they believe that such unreasonable discrimination has occurred"); 14256 ("Parties wishing to challenge the reasonableness of incumbent LEC zone pricing plans may do so as part of the tariff approval process, …, or in a formal complaint under section 208 of the Act."); 14267 ("To the extent that an incumbent LEC attempts to use pricing flexibility in a predatory manner, aggrieved parties may pursue remedies under the antitrust laws or before this Commission pursuant to section 208 of the Act.").

[52] 47 U.S.C. § 503(b)(1)(D) (emphasis added).

[53] 47 U.S.C. § 504(a).

[54] *See* 47 U.S.C. §§ 206-208.

defendant's liability and proving the amount of damages suffered.[55] The Commission cannot use Section 503 to short-circuit this process.

B. **Automatic Forfeitures Would Violate Section 503 and Carriers' Due Process Rights.**

Setting aside the issue of payments to competitors, automatic forfeitures (even if payable to the United States Treasury) would exceed the Commission's authority and unlawfully trample on the key due process protections contained in Section 503. Under the statute, the following steps must be taken before a forfeiture penalty can be imposed: (1) the Commission must issue a notice of apparent liability; (2) the notice must be received; (3) the person against whom the notice has been issued must have an opportunity to show why no such forfeiture penalty should be imposed[56]; and (4) the Commission must find by a preponderance of the evidence that the person has violated the Act or a Commission rule.[57] Section 503(b), in short, requires that parties be given an opportunity to respond to any alleged violations before the Commission can impose a forfeiture.[58] Automatic forfeitures would deny that opportunity, transgressing the Commission's authority and overriding the Act's constitutional due process protections.[59]

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[55] 47 U.S.C. § 208(a); 47 C.F.R. §§ 1.721-1.728.

[56] 47 U.S.C. § 503(b)(4).

[57] *SBC Communications., Inc, Apparent Liability for Forfeiture* Notice of Apparent Liability for Forfeiture and Order, FCC 01-308, ¶ 41 (October 16, 2001).

[58] 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(b); *Pleasant Broadcast Co. v. FCC,* 564 F.2d 496, 497 (D.C. Cir. 1977) (Finding that "[a]ssessment of a forfeiture must be preceded by written 'notice of apparent liability,' setting forth the nature of the alleged violation, and by an opportunity for the [party] to show in writing why he should not be held liable.").

[59] The Commission repeatedly has acknowledged that section 503(b)'s notice and response procedures ensure that constitutional due process requirements are satisfied. *Application for Review of Stephen Paul Dunifer,* 11 FCC Rcd 718, 729 (1995) (finding that "Sections 503 and 504 of the Communications Act provide safeguards which satisfy due process requirements. Specifically, the Notice of Apparent Liability (NAL) must specify the rules that are alleged to be violated, the facts upon which the charge against the violator is based, and the date upon which the alleged violation occurred. Additionally, the party is given an opportunity to respond to the NAL and to have a trial

While the Commission cites to its experience in *overseeing* self-executing performance measures as support for adoption of such a mechanism here, all such plans were voluntarily accepted by the affected parties.[60] The Commission has never imposed such measures without the parties' consent. Indeed, Chairman Powell recently recommended that Congress give the Commission additional authority to enable the Commission to impose liquidated damages payable to competitors.[61] If the Commission already were able to adopt such measures, there would have been no need to request such authority from Congress.[62]

Finally, the Commission should not establish base forfeiture amounts at the statutory maximum.[63] The statutory maximum penalty should be reserved for the most egregious cases of

(Continued . . .)
de novo."); *see also In re Jerry Szoka Cleveland, Ohio Order to Show Cause Why A Cease and Desist Order Should Not Be Issued*, 14 FCC Rcd 9857, 9863 (1999).

[60] *See Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) (establishing a voluntary payment scheme proposed by the applicants as part of the Bell Atlantic-GTE merger conditions); *Ameritech Corp and SBC Communications, Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712 (1999) (establishing a voluntary payment scheme proposed by the applicants as part of the Ameritech-SBC merger conditions).

[61] *FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition*, , 2001 FCC LEXIS 2567 (May 7, 2001). "Congress should consider other mechanisms to compensate harmed CLECs and to enhance deterrence in this area. For example, Congress could give the Commission the authority to award punitive damages, attorneys fees and costs in formal complaint cases filed under section 208 of the Communications Act, or require that interconnection agreements include liquidated damages provisions."

[62] Even if the Commission had authority to adopt a self-executing enforcement plan, imposing such a plan only on the ILECs would create a further disincentive to facilities-based competition. Particularly if payments are excessive in relation to whatever harm is experienced, a potential facilities-based competitor might rationally mitigate its risks by choosing to rely on the ILEC's network instead of deploying its own facilities. Put simply, the prospect of substantial penalty payments would represent an attractive revenue stream that could be tapped into without risking investment resources.

[63] *NPRM*, ¶ 12.

misconduct. Adopting the statutory maximum in this case, without regard to extent of the violation, the harm inflicted, or the violating carrier's actions and intent, would be arbitrary.[64]

V. CONCLUSION

Adopting special access performance measures, reporting requirements, and enforcement mechanisms is manifestly unnecessary and would distort competition and harm consumers, particularly if applied disparately to incumbent LECs. The proposals should not be adopted.

Respectfully submitted,

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[64] To satisfy the arbitrary and capricious standard, an agency must at least reveal "a rational connection between the facts found and the choice made." *Denise A. Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) (quoting *Motor Vehicle Manufactures Association of the United States v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 463 (1983).

ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a/ Verizon Mid-States
GTE Midwest Incorporated d/b/a/ Verizon Midwest
GTE Southwest Incorporated d/b/a/ Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.